# MALAYSIAN REPORTS

## Tan Guan Hock v Khor Chai Heah

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 03-4 OF 1989
LEE HUN HOE CJ (BORNEO), MOHAMED AZMI AND GUNN CHIT TUAN SCJJ
9 FEBRUARY 1990

*Family Law — Divorce — Amendment of petition — Domicile of petitioner — Petitioner stating in petition that he is domiciled in Singapore — Application to amend petition to state that he is domiciled in Malaysia — Whether senior assistant registrar had jurisdiction to hear application — Whether respondent would be prejudiced by amendment — Law Reform (Marriage and Divorce) Act 1976, s 48(1)(c)*

In this case, the appellant had filed a divorce petition in the High Court in Johore Bahru and in it he averred that 'the petitioner is now domiciled in Singapore and the respondent is domiciled in Malaysia'. Subsequently, he applied to amend the said petition to aver that 'the petitioner and the respondent are domiciled in Malaysia'. The senior assistant registrar allowed the application but on appeal to the High Court, the judge allowed the appeal on the ground that the respondent would be prejudiced by the amendment in view of her application to strike out the petition since the fact of domicile was a crucial issue. The appellant appealed.

**Held**, allowing the appeal:

(1) The senior assistant registrar in this case had jurisdiction to entertain the application to amend the petition.

(2) The respondent would not in fact have been prejudiced by the amendment as even after the amendment, the petitioner would still have to prove and satisfy the court that both he and the respondent were domiciled in Malaysia at the time when the petition was presented before the court would exercise its powers under s 48 of the Law Reform (Marriage and Divorce) Act 1976, to give any relief to the parties.

[Didalam kes ini, perayu menfailkan petisyen penceraian di Mahkamah Tinggi Johore Bahru dan didalamnya ia telah menyebut bahawa 'pempentisyen adalah berdomisil di Singapura dan responden berdomisil di Malaysia'. Kemudian ia telah memohon untuk meminda petisyen itu untuk menegaskan bahawa 'pempetisyen dan responden adalah berdomisil di Malaysia'. Penolong kanan pendaftar telah membenarkan permohonan itu akan tetapi apabila rayuan dibuat kepada Mahkamah Tinggi hakim telah membenarkan rayuan atas alasan bahawa responden akan didatangkan kerugian oleh pindaan itu memandangkan ia telahpun memohon membatalkan petisyen itu oleh kerana fakta domisil menjadi issu yang penting. Perayu telah merayu.

**Diputuskan**, membenarkan rayuan:

(1) Penolong kanan pendaftar didalam kes ini mempunyai bidangkuasa menerima permohonan untuk meminda petisyen itu.

(2) Responden tidak sebetulnya didatangkan kerugian oleh pindaan itu oleh kerana selepas pindaan itu pun, pempetisyen akan dikehendaki membukti dan memuaskan mahkamah bahawa ia dan responden adalah berdomisil di Malaysia pada masa petisyen itu difailkan sebelum mahkamah dapat menjalan kuasanya dibawah s 48 Akta Pembahruan Undang-undang (Perkahwinan dan Perceraian) 1976, untuk memberi apa-apa relif kepada pihak-pihak itu.]

**Cases referred to**

1 *Nelson* v *Nelson and Slinger* [1958] 2 All ER 744 (refd)
2 *Wilson* v *Wilson* (1972) LR 2 P&D 435 (refd)
3 *Joseph Wong Lun* v *Yeoh Loon Goit* [1978] 1 MLJ 236 (refd)
4 *Melvin Lee Campbell* v *Amy Anak Edward Somek* [1988] 2 MLJ 338 (refd)
5 *WT Berge* v *Salamah bte Salim* [1979] 1 MLJ 18 (refd)
6 *Williams & Glyn's Bank* v *Astro Dinamico Cia* [1984] 1 All ER 670 (refd)

**Legislation referred to**

Divorce and Matrimonial Proceedings Rules 1980 r 15(2)
Law Reform (Marriage and Divorce) Act 1976 ss 3(2), 48(1)(c)

*Cyrus Das* for the appellant.
*Yap Siong Chen* for the respondent.

*Cur Adv Vult*

**Gunn Chit Tuan SCJ** (delivering the judgment of the court): William Tan Guan Hock (the petitioner) was lawfully married to one Khor Chai Heah @ Khor Ah Chin (the respondent) on 2 December 1969, by way of Chinese customary rites in Kuala Lumpur. On 28 April 1987, he filed a divorce petition in the High Court at Johore Bahru, and in para 3 thereof it was averred that 'The petitioner is now domiciled in Singapore and the respondent is domiciled in Malaysia'. But on 4 June 1988, he filed a summons-in-chambers to amend the said petition by substituting a new para 3 therein in which it was averred that 'The petitioner and the respondent are domiciled in Malaysia'. The senior assistant registrar allowed the petitioner's application to amend the averment in para 3 of his petition and the respondent filed an appeal to the judge in chambers on 16 September 1988.

Before the learned judge, counsel for the respondent argued that para 3 of the petition as originally filed clearly indicated that the petitioner had no capacity to sue for divorce under s 48(1)(c) of the Law Reform (Marriage and Divorce) Act 1976 ('the Act'), which reads as follows:

> Nothing in this Act shall authorize the court to make any decree of divorce except
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> ...
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> (c) where the domicile of the parties to the marriage at the time when the petition is presented is in Malaysia.

Counsel therefore contended that there was no cause of action and accordingly the senior assistant registrar lacked jurisdiction when she heard the application to amend the petition by way of summons-in-chambers.

Counsel for the petitioner on the other hand contended that the said s 48(1)(c) relates to the competence of the court to grant the relief sought and that it did not take away the court's jurisdiction to hear the petition in the

first place. The learned judge accepted the distinction made by counsel for the petitioner with regard to the court's jurisdiction on the one hand and its competence to grant relief sought in the petition on the other. He was of the view that the senior assistant registrar had jurisdiction to hear the application to amend the said petition in view of r 15(2) of the Divorce And Matrimonial Proceedings Rules 1980, which is as follows:

> A petition may be amended without leave before it is served but only with leave after it has been served.

But after counsel for the petitioner had drawn his attention to *Nelson* v *Nelson and Slinger*[1] to support his contention that an amendment of the nature sought by the petitioner should be allowed, the learned judge stated that although there was no practice in the divorce division of the English courts to prohibit amendment to a petition, the English Court of Appeal in that case allowed an amendment to the petition for the reason, inter alia, that the amendment would not cause to the wife any injustice that could not be compensated by costs. His Lordship however thought that the respondent in this case would be prejudiced by the amendment in view of her application to strike out the petition since the fact of domicile was a crucial issue and it had been averred that the petitioner was domiciled in Singapore. On that ground alone he was of the view that the senior assistant registrar was wrong in allowing the application to amend the petition and accordingly allowed the respondent's appeal to him with costs, so that the petition should stand in its original form.

Before us, Mr Cyrus Das, who appeared for the petitioner, after referring to the petition and r 15(2) of the Divorce And Matrimonial Proceedings Rules 1980, contended that the amendment did not prejudice the respondent. He referred to *Wilson* v *Wilson*[2] and pointed out that it was held in that case that the oath of the person whose domicile was in question as to his intention to change his domicile was not conclusive, but the question for the court was whether, upon a review of all the circumstances, it gave credit to his evidence.

Counsel also referred to *Joseph Wong Lun* v *Yeoh Loon Goit*[3] in which case the Singapore High Court held that clear evidence was required to establish a change of domicile. In particular, to displace a domicile of origin in favour of the domicile of choice, the standard of proof goes beyond a mere balance of probabilities. Chua J following *Wilson* v *Wilson*,[2] also held that the oath of the person whose domicile was in question as to his intention to change his domicile was not conclusive. The question for the court was whether, upon a review of all the circumstances, it gave credit to his evidence.

On the intention to change one's domicile of origin counsel referred to the following s 3(2) of the Act:

> For the purpose of this Act, a person who is a citizen of Malaysia shall be deemed, until the contrary is proved, to be domiciled in Malaysia.

Reference was also made to the following passage in *Rayden On Divorce* (14th Ed) at p 56:

> The burden of proving that a domicil has been chosen in substitution for the domicil of origin is on the person who asserts that a domicil of choice has been acquired in place of the domicil of origin: the intention must be proved with perfect clearness.

Counsel submitted that the question of the domicile of the parties would still have to be proved when the petition is heard by the court.

Mr Yap Siong Cheng, counsel for the respondent, referred to *Melvin Lee Campbell* v *Amy Anak Edward Sumek*[4] in which case the High Court at Kuching held, inter alia, that the provision of s 48(1)(c) of the Law Reform (Marriage and Divorce) Act 1976, requires that the court must be satisfied that at the time when the petition was presented, the domicile of both the petitioners was in Malaysia. As the husband petitioner in that case had not succeeded in showing that at the time of the presentation of the joint petition his domicile was in Malaysia, the court held that it therefore had no jurisdiction to entertain the joint petition.

Counsel also referred to *WT Berge* v *Salamah bte Salim*[5] in which case the husband had petitioned for the dissolution of his marriage on the ground of his wife's adultery. The husband was however domiciled in Canada and the Singapore High Court held that as the husband was not domiciled in Singapore, the court had no power to grant him a decree of divorce.

In reply, Mr Das referred us to the following passage in the judgment of Lord Fraser in the House of Lords case of *Williams & Glyn's Bank* v *Astro Dinamico Cia*[6] at p 673:

> The fallacy is in confusing two different kinds of jurisdiction: the first is jurisdiction to decide the action on its merits, and the second is jurisdiction to decide whether the court has jurisdiction of the former kind. The distinction was explained in *Wilkinson* v *Barking Corp* [1948] 1 All ER 564.
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> The argument we are here rejecting seems to be based on a confusion between two distinct kinds of jurisdiction. The Supreme Court may by statute lack jurisdiction to deal with a particular matter.... It has, however, jurisdiction to decide whether or not it has jurisdiction to deal with such matters, ...

Counsel stated that it would be wrong to contend that the court did not have jurisdiction to entertain any petition by virtue of s 48(1)(c) of the Law Reform (Marriage and Divorce) Act 1976.

The question of jurisdiction however did not arise in this case because the senior assistant registrar correctly considered that she had jurisdiction to entertain the peti-

tioner's summons-in-chambers to amend his petition. The learned judge was also correct to rule that the senior assistant registrar had jurisdiction to hear the petitioner's application for amendment of his petition. But we regret that we were unable to agree with the learned judge when he held further that the respondent would be prejudiced by the amendment of the petition in this case. Even after amendment of the petition, the petitioner would still have to prove and satisfy the court that both he and the respondent were domiciled in Malaysia at the time when the petition was presented before the court would exercise its powers under s 48 of the Act to grant any relief to the parties. For the reasons stated above, we therefore allowed the appeal with costs, set aside the order of the learned judge and restored the order of the senior assistant registrar in allowing the said amendment to the petition.

*Appeal allowed.*

Solicitors: *Ho Thian Cheh & Co; Arthur Lee, Yap & Netto.*

Reported by *Prof Ahmad Ibrahim*

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## Taman Zahari Zabidi Sdn Bhd v Adnan Sundra & Low & Anor

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 533 OF 1988
ABDUL HAMID LP, MOHAMED YUSOFF AND AJAIB SINGH SCJJ
15 JANUARY 1990

*Legal Profession — Disbursement — Claim for disbursement by firm of solicitors made on behalf of clients in a land transaction — Defence that solicitors had acted against interest of client — Retainer of solicitor — No rule prohibiting solicitor from acting as common solicitors for purchaser and bank financing the purchase — Whether solicitors had acted in breach of duty to client*

In this case, the appellant had retained the first respondent ('the respondent') to negotiate the purchase of lands at Telok Intan, Perak. The purchase of the land was financed by Bank Bumiputra Malaysia Bhd by a bridging finance of $20,000,000. The bank retained the respondent to prepare the necessary documents for the loan. In pursuance of the loan, the bank issued a letter of undertaking in favour of the vendor. The appellant subsequently sent a cheque for $210,000 to the vendor's solicitors for registration fees on the transfer of the lands to it and it also requested the bank to pay a sum of $126,207 to the respondent as registration fee to charge the lands as security for its loan with the bank. The lands were transferred to the appellant and building plans in respect of the development of the houses on the lands were approved by the relevant authorities. The vendor's solicitors demanded for the release of the balance of the purchase price for the land. At this stage, the appellant changed its mind and decided not to proceed with the purchase. In order to abort the purchase, the appellant sent a letter to the bank to countermand its instructions to pay the registration fees for the charges. No copy of this letter was sent to the respondent. The vendor's solicitors offered a loan to the respondent for the sum required for the registration fees and the respondent secured the loan from the vendor's solicitors, registered the charges and instructed the bank to release the balance of the purchase price amounting to $17m to the vendor. The respondent brought an action to claim disbursement of the sum of $126,200 which they had made on behalf of the appellant. The appellant refused to pay, contending that the respondent had acted against its interests. The learned judge found that the appellant's contention was baseless and awarded judgment for the respondent. The appellant appealed.

**Held,** dismissing the appeal:
On the facts of this case, the respondent had not at any time acted in contravention of any instruction from the appellant. All along, the respondent was acting in accordance with the instructions of the appellant regardless of the fact that the sum required for the stamp duty had not been paid by the bank but advanced by the solicitors for the vendors.

[Di dalam kes ini, pihak perayu telah mendapatkan perkhidmatan pihak responden untuk merundingkan perkara pembelian tanah di Telok Intan, Perak. Pembelian itu dibiayai dengan pinjaman $20,000,000 daripada Bank Bumiputra Malaysia Bhd. Bank itu telah mendapatkan perkhidmatan pihak responden untuk menyediakan dokumen-dokumen untuk pinjaman itu. Mengikut pinjaman itu, bank itu telah mengeluarkan satu surat akujanji kepada pihak yang menjual tanah itu. Pihak perayu kemudiannya telah mengirimkan cek bernilai $210,000 kepada peguam pihak penjual untuk bayaran pendaftaran bagi pemindahan tanah tersebut kepada mereka. Pihak perayu juga telah meminta bank itu membayar sejumlah $126,207 kepada pihak responden untuk bayaran pendaftaran mencagarkan tanah tersebut kepada bank itu sebagai cagaran bagi pinjaman itu. Tanah itu telah dipindahmilik kepada pihak perayu dan pelan-pelan untuk membina rumah-rumah di atas tanah itu telah diluluskan oleh pihak berkuasa yang berkenaan. Peguam pihak penjual seterusnya meminta pembayaran baki wang untuk pembelian tanah itu. Pada ketika itu, pihak perayu telah menukar fikiran dan membuat keputusan menghentikan pembelian itu. Untuk menggugurkan pembelian itu, pihak perayu telah menghantar surat kepada bank itu untuk membatalkan arahan mereka supaya bank itu membayar bayaran pendaftaran cagaran. Salinan surat itu tidak dihantar kepada pihak responden. Peguam pihak penjual telah menawarkan pinjaman kepada pihak responden bagi jumlah yang diperlukan untuk bayaran pendaftaran tersebut. Pihak responden telah mengambil pinjaman itu dan mendaftarkan cagaran itu. Mereka kemudiannya mengarahkan bank itu supaya membayar baki harga pembelian tanah itu sejumlah $17m kepada pihak penjual. Pihak responden seterusnya mengambil tindakan menuntut perbelanjaan sebanyak $126,200 yang telah dibuat oleh mereka bagi pihak perayu. Pihak perayu enggan membayar dan mengatakan bahawa pihak responden telah bertindak menentang kepentingan mereka. Hakim yang arif berpendapat bahawa hujah pihak perayu tidak berasas dan seterusnya memberi penghakiman kepada pihak responden. Pihak perayu telah membuat rayuan.

**Diputuskan,** menolak rayuan pihak perayu:
Mengikut fakta-fakta kes ini, pihak responden tidak sekalipun bertindak melanggar arahan pihak perayu. Tidak kira yang cukai